APPPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6734.

JAMES S. PRATT ET AL., *Petitioners, Appellants,*

v.

COMMONWEALTH OF MASSACHUSSETTS, *Respondent, Appellee.*

Judgment

June 29, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

Georgia v. Rachel, U.S. (6/20/66);
City of Greenwood v. Peacock, U.S. (6/20/66).

By the Court:
Roger A. Stinchfield,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6735.

NATHANIEL W. BARBER, *Petitioner, Appellant,*

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent, Appellee.*

Judgment

June 29, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

Georgia v. Rachel, U.S. (6/20/66).
City of Greenwood v. Peacock, U.S. (6/20/66).

By the Court:
Roger A. Stinchfield,
Clerk.

DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS

v.

JAMES S. PRATT, LYLE S. WOODCOCK, MORRIS GARFINKLE, HOUSEHOLD FINANCE CORPORATION, *a Deleware Corporation, and* LIBERTY LOAN CORPORATION, *a Deleware Corporation.*

C.A. No. 66-317-S

Petition for Removal of Criminal Prosecution

1. This petition is brought pursuant to 28 U.S.C. 1443.

2. Petitioners are defendants in the above-entitled criminal prosecutions now pending in the Suffolk Superior Court, Commonwealth of Massachusetts, and seek removal of the indictments therein, as follows:

(a) No. 11898, naming petitioner Household Finance Corporation (hereinafter called Household) and others as defendants;

(b) No. 11900, naming petitioners Household, Liberty Loan Corporation (hereinafter called Liberty), James S. Pratt (hereinafter called Pratt), Lyle S. Woodcock (hereinafter called Woodcock), and others as defendants;

(c) No. 11904, naming petitioners Household, Pratt, and others as defendants;

(d) No. 11906, naming petitioners Household, Pratt, and others as defendants;

(e) No. 11908, naming petitioners Household, Liberty, Pratt, Woodcock, and others as defendants;

(f) No. 11909, naming petitioners Household, Pratt, and others as defendants;

(g) No. 11910, naming petitioners Household, Liberty, Pratt, Woodcock, and others as defendants;

(h) Nos. 11922 through 11937, both inclusive, each naming petitioner Morris Garfinkle (hereinafter called Garfinkle) as sole defendant;

(i) No. 11974, naming petitioner Garfinkle and another as defendants;

(j) No. 11995, naming petitioner Household as sole defendant;

(k) No. 11997, naming petitioner Liberty as sole defendant;

(l) No. 11998, naming petitioner Pratt as sole defendant; and

(m) No. 12032, naming petitioner Woodcock as sole defendant. Copies of the foregoing indictments are filed herewith and marked I. Neither the indictments nor any other process, pleadings, or orders have been served upon petitioners. None of said indictments has yet been brought to trial.

3. Removal is sought to protect the rights guaranteed to the petitioners under the equal protection and privileges and immunities clauses of Section 1, Fourteenth Amendment to the Constitution of the United States, and to protect the rights guaranteed to the petitioners under the laws of the United States providing for the equal civil rights of citizens of the United States and all persons within the jurisdiction thereof.

4. The petitioners have been denied and cannot enforce in the courts of the Commonwealth of Massachusetts rights under the Constitution and laws of the United States providing for the equal civil rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the Commonwealth of Massachusetts, by statute and current usage and practice, is maintaining and encouraging a policy of wilful and systematic discrimination against the petitioners in the investigation,

institution, and prosecution of the so-called small loans cases and is subjecting the petitioners to punishments, pains, and penalties of a kind different from that to which other citizens are subjected, as will hereinafter be more fully stated.

5. The corporate petitioners are Delaware corporations and do business in the so-called "small loans" field. The individual petitioners, except for Garfinkle, who is alleged to be a public official, are allegedly employees of the corporate petitioners. The petitioners have been indicted, under the unique procedures hereinafter set out, for offenses relating to the corruption of public officials.

6. All of the indictments herein were sought and returned under special and unique methods, applied to these petitioners and not others, which special and unique methods may generally be described as a prosecution conducted by a commission of the legislative branch of state government, staffed by employees of the legislative branch, and paid for out of funds especially appropriated by and for the legislative branch, which prosecution has led to indictments prepared and directed by legislative employees and returned by a so-called special grand jury, especially created to hear evidence gathered and presented by legislative employees.

7. The legislative commission referred to above was created by a Resolve of the Massachusetts General Court in 1962, Chapter 146 (a copy of which is filed herewith and marked II) and immediately adopted the name of "Massachusetts Crime Commission." The initial, and subsequent, appropriations for its work totaled $640,000. The Massachusetts Crime Commission in all of the matters herein described took defacto control of the entire investigative and prosecutorial steps and procedures involved in the criminal prosecutions herein sought to be removed. It effectively assumed control of prosecutions of these petitioners in a manner not applied to other persons investigated

or charged with crime, who are accorded the protections of the usual customs and practices of law enforced in Massachusetts.

8. The facts and circumstances surrounding the investigations and indictments are as follows:

(a) By the Resolves of 1962, Chapter 146, the legislature of Massachusetts authorized the appointment of a seven-member commission (hereinafter designated the Crime Commission or the commission) "to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practices in government at state and local levels . . ." The Resolve further provided that "[upon order of the Commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission . . ." The combination of powers given the Commission was entirely without precedent.

(b) The Commission was organized in October, 1962, with Alfred Gardner (hereinafter called Gardner) as chairman, who acting in the name of the Commission, immediately assumed the exercise of powers never before given in the Commonwealth of Massachusetts.

(c) From the beginning, the Commission conceived one of its functions to be the obtaining of indictments and the securing of convictions. The prosecution of the defendants was undertaken by the Commission not to vindicate offenses committed against the state but to demonstrate to the legislature the need for the adoption of the Commission's recommendations for legislation. Accordingly, it constituted itself a unique law enforcement body whose principal purpose was to punish those responsible for corruption in state government.

(d) In June, 1963, as one of its areas of inquiry, the Commission voted to investigate the activities of the Massachusetts Department of Banking and Insurance, which later became known as the small-loans investigation.

(e) At the same time it employed, and placed in charge of the investigating team for small-loans, Marshall Simonds (hereinafter called Simonds), an attorney who was, at the time and at all relevant times up to and including the dates on which indictments were returned against petitioners, employed by a large Boston law firm representing financial institutions and banks who were and are, in the matter of small loans, competitors of the petitioner corporations and whose interests in that respect are antagonistic to petitioners.

(f) Simonds began working for the Commission in August, 1963. The Commission paid Simonds over $40,000 for his services, all of which money was remitted by Simonds to the law firm from which he continued to receive his regular salary.

(g) Between August, 1963, and January 27, 1964, Simonds spent most of his working time as head of the small-loans investigation. In that capacity he interrogated witnesses both privately and at formal hearings before the Commission, checked documentary evidence, determined whether subpoenas for witnesses should issue in the Commission's name, enforced testimony of a recalcitrant witness by appearing as attorney for the Commission in a suit in equity to compel his testimony, supervised other staff members participating in the investigation, and developed a plan for prosecuting the petitioners.

(h) Meanwhile, from November, 1962, and thereafter from time to time, Chairman Gardner discussed with the Attorney-General-elect, later Attorney General Brooke, plans for prosecution based upon the Commission's investigation. After agreement with Gardner, Brooke made a written request to the Chief Justice of the Superior Court

for the convening of a special grand jury, under the provisions of G. L. c. 277, § 2A, "to hear, consider and report on such matters as the Attorney General may present." Gardner appeared with Brooke before the Chief Justice in support of the request. The request was granted and a special grand jury convened in Suffolk County on January 27, 1964.

(i) The special grand jury was brought into existence for the singular purpose of hearing only so-called "Crime Commission Cases," which in every substantive respect are similar to ordinary criminal cases alleging like offenses.

(j) Although empowered by statute only "to hear, consider and report," the special grand jury returned numerous indictments, some on February 15, 1964, and the remainder on May 8, 1964, under some of which petitioners are presently being prosecuted. The special grand jury was the only such grand jury in the history of the Commonwealth of Massachusetts ever to have returned indictments. Between January 27, 1964, and May 8, 1964, the special grand jury sat simultaneously with the regular grand jury in Suffolk County.

(k) In the selection of special grand jurors, all non-registered voters were intentionally and systematically excluded by administrative action of City of Boston officials and numerous categories of persons otherwise qualified were intentionally and systematically excluded with the result that the special grand jury did not represent a fair cross-section of the community unlike the composition of other grand juries of other counties, which are drawn in compliance with state law.

(l) Contrary to express provisions of state law, members of the Boston Police Department questioned some of the special grand jurors after they had been selected as veniremen, relative to their qualifications for jury service. The questions in this instance included inquiries relative

to the general subject of public officeholders. (The questioning of jurors by police, has, since these indictments, been stopped in Suffolk County as the result of the petitioners' objections).

(m) For the prosecution of the cases before the special grand jury, a further special procedure was devised by agreement between Brooke and Gardner. After numerous discussions between the two, it was agreed in December, 1962, that investigators for the Commission might present evidence to the special grand jury. In general, the effect of this agreement was to let Commission personnel manage cases through the grand jury stage. The Commission thereupon voted formally to refer the matter to the Attorney General. Accordingly, on January 24, 1964, Brooke purported to appoint Simonds as special assistant Attorney General for the special purpose of handling only Crime Commission cases and, on January 27, 1964, Simonds was sworn and immediately assumed the presentation of the small-loans cases to the special grand jury which had just been convened.

(n) Thereafter, during the sitting of the special grand jury between January 27 and May 8, 1964, Simonds retained at his private law office some of the evidence he had assembled at the Crime Commission, and was further assembling by hearings being conducted by him for the Crime Commission, and contemporaneously appeared before the special grand jury, presented such testimony and evidence, and interrogated before the special grand jury the witnesses whom he previously had questioned as investigator for the Commission.

(o) During his service as a purported special assistant Attorney General between January 27 and May 8, 1964, Simonds continued to be employed by the Commission and paid out of its legislative appropriation. Only those of the Commission's attorneys who accepted appointments as special prosecutors were retained by the Commission until

its expiration; the employment contracts of all others were terminated prior thereto. Simonds' compensation during this period was for work done in connection with the small-loans case, of which Simonds continued to be in charge. Such compensation was paid for the time spent preparing evidence for presentation to the special grand jury. The moneys so paid were in every case remitted to Simonds' law firm, from which he continued to receive his regular compensation.

(p) At times during the special grand jury sitting, Simonds revealed testimony given by witnesses before the special grand jury to a police officer who was an investigator for the Commission, permitted grand jury records to be kept in the charge of a Commission employee, and revealed the testimony of prior witnesses to prospective witnesses in order to induce and compel them to testify for the Commission before the special grand jury. Simonds had control over the grand jury exhibits and evidence, much of which was kept in his private office.

(q) Prior to the conclusion of the testimony before the special grand jury and without its prior request or permission, Commission personnel selected the crimes to be charged and those persons to be named as defendants, as well as those to be named only as co-conspirators, and prepared indictments accordingly. Thereafter, at the conclusion of the testimony, these indictments were presented to the special grand jury, and, without exception, voted by it precisely as presented.

(r) 129 indictments in 249 counts, involving 7 co-conspirators and 32 defendants, 10 of whom were corporations, were submitted to the special grand jury for vote on May 7 and May 8, 1964. During the voting, five prosecutors, including the Attorney General and Simonds, were present, being seated at a table parallel to and opposite the jurors and votes were taken in their presence and sight. No request had been made by the special grand

jurors or any of them for any prosecutor to be present. During the submission of indictments, specific references were made by prosecutors to evidence previously given during the presentation of evidence. The Attorney General was not present to answer questions the jurors might have but devoted himself solely to the signing of indictments. One or two of the other prosecutors were there solely for the alleged purpose of conveying the indictments to and from the foreman of the jury.

(s) The Commonwealth has expressed its intention to move to trial each of numerous sets of indictments involving these and other defendants *in seriatim*.

9. Under Massachusetts criminal procedure, applied to its citizens not marked for prosecution by the Massachusetts Crime Commission, the special prosecutorial procedures and devices enumerated above are not employed. All such practices used against these petitioners were special, unique, and violative of the legal guarantees which Massachusetts accords in grand jury cases. Because of the foregoing, the petitioners have been subjected to unique and discriminatory treatment in the investigation and prosecution of their cases, have been treated in a manner unlike other citizens of Massachusetts who face prosecution for alleged crimes, have not been afforded equal protection of the laws of Massachusetts, and are being subjected to punishment, pains, and penalties unlike those to which other citizens of Massachusetts are subjected, all in violation of the petitioners' rights under the equal protection and privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States and the rights guaranteed to the petitioners under the laws of the United States providing for the equal civil rights of citizens of the United States.

10. Petitioners have diligently sought state court relief from the matters complained of:

(a) The indictments herein were returned on May 8, 1964, and, on July 31, 1964, the petitioners filed pleas in abatement directed against the unique prosecutorial role of the Massachusetts Crime Commission, as hereinabove set forth.

(b) Arguments were held and briefs duly submitted to the trial court in January and February, 1965.

(c) Commencing in September, 1965, decisions were filed denying petitioners' pleas and, by mid-December, 1965, the court has denied all of petitioners' pleas.

(d) In mid-December, 1965, at the suggestion of petitioners, the court requested all defendants to select those issues which they contended were ". . . so important or doubtful as to require the decision of the Supreme Judicial Court thereon before trial, in the interest of justice . . ." (Mass. G. L. c. 278, § 30A, allowing a report to the Supreme Judicial Court in the discretion of the trial judge) and asked the Attorney General to indicate whether he would assent to such a report.

(e) It was not until March 8, 1966, that the Attorney General made known his opposition to the report, whereupon on March 11, 1966, petitioners filed their formal request for report. Arguments were held and brief submitted thereon on March 15, 1966.

(f) On March 25, 1966, the trial court denied the requested report and, in the same order, set trial for April 25, 1966 (later changed to May 2, 1966).

(g) On March 29, 1966, a petition for writ of error on the matters in abatement was presented to a single Justice of the Supreme Judicial Court. After hearing and submission of briefs, the petition was dismissed on April 14, 1966.

(h) A motion for a stay of trial pending full bench review of the dismissal of the petition for writ of error was denied by the single Justice on April 26, 1966.

WHEREFORE, the petitioners pray that this Court (1) retain jurisdiction of the causes now before it and order that the prosecution of the indictments proceed herein as if originally returned within the jurisdiction of this Court and order the indictments herein abated and dismissed.

By their attorneys,
Francis J. DiMento
FRANCIS J. DIMENTO
100 State Street
Boston, Massachusetts 02109
Attorney for petitioner James S. Pratt

Robert V. Mulkern
ROBERT V. MULKERN
332 Main Street
Worcester, Massachusetts
Attorney for petitioner Lyle S. Woodcock

Earl Auerback
EARL AUERBACK
18 Tremont Street
Boston, Massachusetts
Attorney for petitioner Morris Garfinkle

Thomas M. Joyce
THOMAS M. JOYCE
Thomas E. Dwyer
THOMAS E. DWYER
22 Beacon Street
Boston, Massachusetts 02108
Attorney for petitioner Household Finance Corporation

Daniel F. Featherston, Jr.
DANIEL F. FEATHERSTON, JR.
7 Water Street
Boston, Massachusetts
Attorney for petitioner Liberty Loan Corporation

VERIFICATION

Boston, Massachusetts April 28, 1966

I, Francis J. DiMento, upon oath say that I am one of the attorneys for petitioners and that I have read the foregoing petition and the facts contained therein are true to the best of my information, knowledge and belief.

Francis J. DiMento
FRANCIS J. DIMENTO

Subscribed and sworn to before me this twenty-eighth day of April, 1966.

Walter J. Hurley
Notary Public
My commission expires:
Jan. 8, 1968

Denied
Geo. C. Sweeney, D. J.
4/29/66

Motion to Remand

Now comes the Commonwealth and moves the Court to remand this cause to the Suffolk Superior Court, from which Court it was attempted to be removed to this Court for the reasons and upon the grounds hereinafter set forth:

1. The petition on its face does not state a cause for removal;

2. The petition does not allege a denial of or an inability to enforce civil rights.

Wherefore the court prays that this cause may be remanded to the Suffolk Superior Court there to be proceeded with according to the practice governing such cases.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General
By: Brian E. Concannon
BRIAN E. CONCANNON

Allowed
Geo. C. Sweeney, D. J.
4/29/66

Order to Remand

SWEENEY, D. J. After hearing on the plaintiff's motion to remand and the Court having allowed said motion; it is hereby

ORDERED that the above entitled action be and hereby is remanded to the Superior Court for the County of Suffolk, Commonwealth of Massachusetts.

By the Court,

F. J. AHERN
Deputy Clerk

GEO. C. SWEENEY
United States District Judge
5/5/66 as of
April 29, 1966